Amanah Merchant Bank v Lim Tow Seng & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-23-1218-88
SITI NORMA YAAKOB J
12 APRIL 1993

Banking *— Securities for advances — Guarantee given by director for banking facilities — Facility extended by bank — Whether subsequent extensions were fresh facilities — Whether guarantor was liable for extensions of facility granted to borrowers*

Banking *— Securities for advances — Guarantee given by director for banking facilities — On demand guarantee — Notice of demand — Whether service by AR registered is in compliance with letter of guarantee — Burden of proof on plaintiff — Whether burden discharged to establish cause of action*

Civil Procedure *— Trial — Whether issue not raised at proceedings under O 14 of the Rules of the High Court 1980 can be raised at full trial — Rules of the High Court 1980 O 14*

Words and Phrases *— 'Post'*

The second defendant ('the defendant') was at all material times a director of Emporium & Supermarket Holdings Bhd, its subsidiaries and its associated companies ('the borrowers'). He is being sued by the plaintiffs in his capacity as a guarantor under a guarantee dated 3 October 1984 in relation to a revolving bankers acceptance facility ('the facility') granted to the borrowers. The facility was subsequently extended by the plaintiff several times. The defendant contended that the extensions were fresh facilities for which he is not liable. He maintained that the guarantees were not only limited by amount but also by time. Under cl 17 of the guarantee executed by the defendant, any notice of demand shall be served on the defendant personally or through the post to his last known address. It is not disputed that the letter of demand dated 4 March 1988 was not posted in compliance with cl 17 of the guarantee but was sent by AR registered post. The AR card was never returned and the defendant claimed that the notice of demand had not been effectively served on him. The plaintiff objected to this defence as the defendant did not raise this in the earlier O 14 of the Rules of the High Court 1980 proceedings and was therefore debarred from raising it in the trial.

Held, dismissing the plaintiff's claim:

(1) There was no merit in the defendant's contention that the extensions were in respect of fresh facilities. On the contrary, there was evidence to show that the facility which was extended was the same facility but renewed for the benefit of the borrowers. Moreover, the borrowers had utilized the facility during the currency of the temporary approval. To that end, as the guarantee executed by the defendant was a continuing guarantee, it covered

all liabilities incurred by the borrowers, not only during the currency of the original facility but also during the currency of subsequent renewals of the same facility.

(2) The guarantee executed by the defendant was an 'on demand' guarantee and under cl 17, any notice of demand should be served on him personally or sent to his last known address. The burden is on the plaintiff to prove that the notice of demand had been sent to and received by the defendant. Since the essence of the plaintiff's claim is founded on the guarantee, it is incumbent upon the plaintiff to prove that such a notice had been effectively sent and received. The plaintiff has not discharged this burden and as such has not established a cause of action against the defendant.

(3) At the O 14 stage, the defendant need only raise one triable issue acceptable to court to enable him to defend this suit. The fact that the issue of demand was not raised at the O 14 proceedings does not debar him from relying on it at trial so long as he had made an issue of it in his pleadings.

[Bahasa Malaysia summary

Defendan kedua ('defendan itu') pada semua masa yang penting merupakan seorang pengarah Emporium & Supermarket Holdings Sdn Bhd, subsidiarinya dan syarikat-syarikat bersekutunya ('peminjam itu'). Plaintif telah mendakwa defendan itu selaku penjamin di bawah suatu surat jaminan yang bertarikh 3 Oktober 1984 berhubungan dengan suatu kemudahan 'revolving bankers acceptance' ('kemudahan itu') yang telah diberi kepada peminjam itu. Kemudahan itu kemudiannya telah dilanjutkan beberapa kali oleh plaintif. Defendan berhujah bahawa lanjutan itu merupakan kemudahan baru dan beliau tidak bertanggungan terhadapnya. Beliau juga menyatakan bahawa jaminan itu terhad bukan hanya setakat mengikut jumlahnya tetapi juga mengikut masa. Di bawah fasal 17 surat jaminan yang dilaksanakan oleh defendan itu, sesuatu notis tuntutan sepatutnya diserahkan kepada defendan ke dirinya atau melalui pos kepada alamat akhirnya yang diketahui. Tidak dipertikaikan bahawa surat tuntutan yang bertarikh 4 Mac 1988 tidak diposkan mengikut fasal 17 surat jaminan itu tetapi dihantar melalui surat akuan berdaftar. Kad surat akuan berdaftar itu tidak dikembalikan dan defendan mendakwa bahawa notis tuntutan itu tidak disampaikan secara efektif ke atasnya. Plaintif membantah pembelaan ini atas alasan bahawa defendan tidak membangkitkan isu ini dalam prosiding A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 yang telah diadakan dan oleh itu beliau dihalang dari membangkitkannya di dalam perbicaraan ini.

Diputuskan, menolak tuntutan plaintif:

(1) Tidak terdapat merit dalam dakwaan defendan bahawa lanjutan itu adalah terhadap kemudahan baru. Sebaliknya, terdapat bukti

yang menunjukkan bahawa kemudahan yang telah dilanjutkan itu merupakan kemudahan yang sama tetapi yang telah diperbaharui bagi kemudahan peminjam. Lebih-lebih lagi, peminjam telah menggunakan kemudahan itu semasa tempoh kebenaran sementara itu. Oleh itu, disebabkan bahawa jaminan yang telah dilaksanakan oleh defendan itu adalah jaminan berterusan, ia meliputi semua tanggungan peminjam, bukan setakat bagi masa kemudahan asal tetapi juga bagi masa lanjutan berikut kemudahan itu.

(2) Jaminan yang telah dilaksanakan oleh defendan merupakan suatu jaminan 'on demand' dan dibawah fasal 17, sebarang notis tuntutan sepatutnya disampaikan kepada defendan ke dirinya atau ke alamat akhirnya yang diketahui. Beban terletak atas plaintif untuk membuktikan bahawa notis tuntutan telah dihantar kepada dan diterima oleh defendan. Oleh kerana intipati tuntutan plaintif terhadap defendan berasaskan jaminan itu, plaintif berkewajipan untuk membuktikan bahawa notis itu pada hakikatnya telah diserahkan dan diterima. Plaintif tidak melaksanakan beban itu dan dengan itu tidak menunjukkan suatu kausa tindakan terhadap defendan.

(3) Pada peringkat A 14 itu, defendan hanya perlu membangkitkan satu isu pertikaian yang boleh diterima oleh mahkamah untuk membolehkan beliau membela guaman itu. Hakikat bahawa isu surat tuntutan itu tidak dibangkitkan dalam prosiding A 14 itu tidak menghalang defendan daripada bergantung padanya dalam perbicaraan itu asalkan beliau telah membangkitkan isu itu dalam plidingnya.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 02–172–93.]

Notes

For cases on guarantees given by directors for banking facilities, see 1 *Mallal's Digest* (4th Ed) paras 916–917.

Cases referred to

1 *United Prime Corporation Bhd v Q-Built Construction (M) Sdn Bhd & Ors* [1987] 1 CLJ 501 (refd)

2 *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd* [1987] 2 MLJ 610 (refd)

3 *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd* [1989] 3 MLJ 155 (refd)

4 *MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors* [1990] 1 MLJ 180 (refd)

5 *The Cooperative Bank Ltd v Dato Seri Mohd Adib Mohd Adam* (unreported) (refd)

6 *Public Bank Bhd v Rasatulin Holdings Sdn Bhd & Ors* [1989] 1 MLJ 47 (folld)

Benjamin Dawson (*Nik Hussain & Partners*) for the plaintiff. A
Su Tiang Joo (*Cheah Teh & Su*) for the second defendant.

Cur Adv Vult

Siti Norma Yaakob J: The trial of this suit is confined to the second B
defendant ('the defendant') and he is sued under a guarantee dated 3 October 1984 at AB4–7 pursuant to which he undertook to pay the plaintiff all sums due under a revolving bankers acceptance facility ('the facility') granted by the plaintiff to Emporium & Supermarket Holdings Bhd, its subsidiaries and associated companies ('the borrowers'). The defendant was a director of the borrowers at the material time and under cl 1 of the C
guarantee at AB4, his liability is limited to RM2m, the amount that is claimed by the plaintiff in this suit following the default of the borrowers to make payment of the sum due under the facility.

The defendant strongly resists the claim and has raised two defences: (1) that it has nothing to do with the guarantee he had executed; and (2) that D
the plaintiff have no cause of action against him.

The granting and acceptance of the facility is evidenced by a bankers acceptance agreement dated 20 September 1984, at AB1–3 ('the agreement'), executed by the plaintiff with the borrowers. Under cl 5 of the agreement at AB1, a RM2m facility was available to the borrowers for a period of one year commencing from 12 June 1984 until 11 June 1985, and thereafter it E
can be renewed for further periods as shall be mutually agreed between the plaintiff and the borrowers.

The evidence led by the plaintiff's officers, PW1, PW2 and PW3, shows that just one day before the facility expired and on 10 June 1985, the chief executive of the plaintiff bank through AB128–129 gave a temporary approval F
extending the availability of the facility for three months to commence from 12 June 1985 to 11 September 1985. This was very much an internal matter and it was done unilaterally without any request from the borrowers for an extension. The plaintiff's reason for doing so was to maintain the good banker and customer relationship which the plaintiff had with the borrowers then. The plaintiff also explained that a temporary approval as opposed to G
a formal extension was granted at that time as there was a backlog of accounts to be reviewed by the plaintiff's executive committee. In any event, before the expiry of the three months temporary period and on 22 August 1985, the plaintiff formally approved an extension of the facility for one year to take effect from 22 August 1985 to 22 August 1986. This was H
followed by a letter from the plaintiff dated 23 August 1985 at AB16–17, informing the borrowers of the extension and this was duly accepted by the borrowers as seen from their acknowledgement at AB17.

After 22 August 1986, two further temporary extensions for the duration of three months each were approved by the chief executive of the plaintiff bank to take effect from 22 August 1986 to 21 November 1986 and from I
21 November 1986 to 20 February 1987. This is evidenced by AB112–117. After 20 February 1987, no further extensions, temporary or otherwise, were granted by the plaintiff as by that date the borrowers were already in default.

The plaintiff also explained that unlike the previous extension when the first temporary extension was granted followed by a formal extension of one year, the same procedure was not adopted after the second temporary extension was granted as the borrowers had failed to submit their audited accounts to the plaintiff in compliance with cl 7 of the agreement at AB2. Hence only a third temporary extension of three months was granted after the second temporary extension expired on 21 November 1986. From this evidence, it is clear that there was no break in the availability of the facility as it was continued from 11 June 1985 to 20 February 1987 when it was discontinued altogether.

There is also evidence to show that the borrowers utilized the facility during the currency of the one year extended period, thereby incurring a liability amounting to RM322,000 and another RM1.678m during the currency of the second temporary approval. For this purpose, the plaintiff rely on P10, the borrowers' statement of account prepared by the plaintiff in pursuance to cl 6 of the guarantee, the conclusive evidence clause at AB5.

It is the defendant's contention that his liability under the guarantee is only limited to the indebtedness incurred by the borrowers during the currency of the agreement and in accordance with cl 5 of the agreement, ie for the period 12 June 1984 to 11 June 1985. He further contends that the further extensions granted by the plaintiff and covering the period 12 June 1985 to 20 February 1987 are in respect of fresh facilities granted by the plaintiff to the borrowers for which fresh letters of guarantee should have been executed by him if he is to be made liable for the borrowers' indebtedness during the extended periods. Since the borrowers incurred no liability during the period 12 June 1984 to 11 June 1985 and the guarantee he executed was only meant to cover that period, he is not liable to meet the plaintiff's demand for a sum of money incurred by the borrowers after 12 June 1985. He maintains that the guarantee is not only limited by amount but also by time.

Clause 5 of the agreement empowers the plaintiff acting mutually with the borrowers to renew the facility for further successive periods after 11 June 1985. This was done by the plaintiff, although they had proceeded to do so initially on their own accord but any notion that they had done so in contravention of cl 5 is dispelled by the subsequent conduct of the borrowers in accepting the renewals and utilizing the facility during the currency of the renewals. The second defendant, as the director of the borrowers, acknowledged the one year renewal from 23 August 1985 to 22 August 1986 and this is further confirmed by their resolutions at AB18–26. In his capacity as the director of the borrowers, he must have been fully aware that the facility was utilized during the renewed periods. As such, he cannot now claim that there was no 'mutuality' as far as the renewals are concerned.

All the three bank officers testified that all the renewals were extensions of the facility and were not fresh facilities granted to the borrowers. For this contention the plaintiff rely on AB16–17, their letter notifying the borrowers that the facility was made available to them 'for a further period of one year up to 22 August 1986', upon the same terms and conditions contained in the agreement subject always to the plaintiff's right to recall the facility on demand.

The first objection taken on this letter is what the defendant says is the introduction of a new term, namely, the plaintiff's right to recall on demand which he argues, is not found in the agreement and this confirms that the facility granted was a fresh facility altogether which is not covered by the guarantee he signed. A

I consider there is no merit to this objection as cl 9 of the agreement at AB3, does empower the plaintiff with the right to recall the facility on demand and when AB16 makes mention of it, it was not intended to introduce a new term for the renewed facility but only to emphasize the plaintiff's remedy for default as contained in cl 9 of the agreement. B

There is also evidence to show that the borrowers tendered certified copies of their resolutions at AB18–26, accepting the renewal of the facility for the period 23 August 1985 to 22 August 1986. It was during this period too that the borrowers incurred the debt of RM322,000. Since no similar resolutions were tendered by the borrowers accepting the renewals of the facility during the two periods of temporary approvals after 22 August 1986, the defendant maintains that, if at all, he is only liable for the debt of RM322,000 and not for RM1.678m as the latter sum was incurred during the second temporary approval. C D

Here again I see no merit to the defendant's argument as there is no evidence to show that the facility granted after 22 August 1986 was a fresh facility. On the contrary, there is evidence from PW1, PW2 and PW3 who testified that the facility granted after that date was the same facility but renewed for a period of time as empowered by cl 5 of the agreement. Added to this is the glaring evidence that there was no break in the availability of the facility after the first expiry date of 11 June 1985, but that it continued until 20 February 1987, when it was discontinued altogether. The very fact that the borrowers utilized the facility during the currency of the second temporary approval without question lends further support to the conclusion that the facility was not a fresh facility but the same facility renewed for the benefit of the borrowers. To that end, as the guarantee executed by the defendant is a continuing guarantee, it covers all liabilities incurred by the borrowers not only during the currency of the original facility but also during the currency of subsequent renewals of the same facility. E F

The guarantee executed by the defendant is an 'on demand' guarantee and under cl 17 at AB7, any notice of demand shall be served on him either personally or sending such notice through the post in an envelope addressed to his last known place of address and a notice so served shall be deemed to be served on him the day following that on which the notice was posted. G

It is not disputed that the letter of demand dated 4 March 1988, AB124–125, was not posted in compliance with cl 17 of the guarantee but instead it was sent by AR registered post. The postal authorities at AB126 acknowledged receipt of the letter of demand for service on 9 March 1988, but the AR card was never returned and this has provided the defendant with the defence that the plaintiff had no cause of action against him as the notice of demand had not been effectively served on him. H I

The first objection taken by the plaintiff on this defence is that since the defendant had not pleaded that he did not receive the letter of demand in his statement of defence and coupled with the fact that he chose not to lead

A any evidence in court, I should not give any consideration to his defence but instead draw an unfavourable inference that his defence is not bona fide.

By para 4 of the amended statement of claim, the plaintiff have pleaded that a demand for payment was made to the defendant through their solicitors' letter dated 4 March 1988. This plea has been specifically replied B by para 12 of the statement of defence by the defendant denying para 4 of the amended statement of claim and putting the plaintiff to strict proof of such a demand.

By so pleading, I consider that the defendant has raised an issue on the letter of demand itself and the burden is on the plaintiff to prove that such a notice had been sent to and received by the defendant. The fact that the C defendant had not specifically pleaded that he did not receive the letter of demand makes no difference and no weight to the plaintiff's burden of proof that such a notice had been effectively sent. Since the essence of the plaintiff's claim is founded on the guarantee, it is incumbent upon the plaintiff to prove that such a notice had been effectively sent and received. D It is also for this very reason that I cannot arrive at any unfavourable conclusion by the defendant electing not to adduce any evidence in court. It is a right which is exclusively his to exercise, particularly so when there is in this case an allegation that a cause of action had not been made out against him and the fact that the plaintiff are denied a chance to cross-examine him does not afford me with the right to infer that his defence is E mala fide.

Another objection taken on this defence is that such a defence was available to the defendant in the earlier O 14 proceedings but since he chose not to rely on it, he is debarred from doing so at his trial.

I do not consider that there is any merit to this objection as at the O 14 F stage, the defendant need only raise one triable issue acceptable to the court to enable him to defend this suit. As such, the fact that the issue of demand was not raised at the O 14 proceedings does not debar the defendant from relying on it at the trial for so long as he had made an issue of it in his pleadings. This he has done through para 12 of his statement of defence.

The plaintiff also maintain that the letter of demand had been correctly G addressed to the defendant and since neither the letter nor the AR card had been returned, by the saving provisions of cl 17 of the guarantee, the notice is deemed to have been received by the defendant on 10 March 1988, a day after the postal authorities acknowledged receipt of the letter for service. This argument would stand if the letter of demand had been sent by H ordinary post as the saving provisions of cl 17 are only good for notices sent by ordinary post. As I had stated earlier, this agreed mode of service was not adopted by the plaintiff but they took on the added responsibility of sending the letter of demand by AR registered post instead.

A number of authorities were cited as to the meaning of the word 'post', the difference between ordinary post and registered post and the presumption I of receipt, but I consider all the cases are irrelevant as the present case deals with AR registered post.

A number of other authorities were also relied upon which emphasized the need for a cause of action to be established against a guarantor by the

effective service and receipt of a letter of demand. I make the following observations to these cases.

United Prime Corp Bhd v Q-Built Construction (M) Sdn Bhd & Ors,[1] *Mok Hin Wah & Ors v United Malayan Banking Corp Bhd*[2] and *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd*,[3] all held that carbon copies of the letters of demand sent to the guarantors cannot constitute proper or effective demands under the 'on demand' guarantees they executed even though they, as directors of the borrowers, had actual notice of such demands.

MBf Finance Bhd v Hasmat Properties Sdn Bhd & Ors[4] dealt, inter alia, with a notice of demand sent by AR registered post to one of the guarantors contrary to what was stipulated in the guarantee, namely, that the written demand or request be sent by registered post at the guarantors' respective addresses or delivered by hand to the guarantors personally at their last known place of residence. Abdul Malek J held that in the absence of the AR card, the letter of demand was not served on one of the guarantors.

In the unreported case of *The Cooperative Bank Ltd v Dato' Seri Mohd Adib Mohd Adam*,[5] the loan agreement specifically provides that a letter of demand is deemed to have been served if sent by registered post notwithstanding that it be undelivered or returned undelivered. The letter of demand was instead sent by AR registered post and the AR card was not returned, and it was argued that the demand was ineffective. Dato' VC George J held that on the principle of the greater including the lesser, sending the letter by AR registered post is a more sophisticated version of the ordinary registered post and that it falls within the deeming provision of the loan agreement.

On the facts of the case before me, I consider that sending a letter by AR registered is 'greater' and not 'lesser' than sending it by ordinary post as the postman must obtain an acknowledgement of receipt of the letter on the AR card in the case of the former but not in the case of the latter. It is only upon the return of the AR card with the acknowledgement of receipt that it can truly be said that the letter of demand has been effectively served on the guarantor. Anything short of that can never amount to the letter of demand having been served on the guarantor where posting is done through AR registered post.

Perhaps the only case which falls on all fours with the instant case is that decided by me in *Public Bank Bhd v Rasatulin Holdings Sdn Bhd & Ors*,[6] where I held that to constitute a proper demand, the burden is on the plaintiff to prove that the AR card is returned duly acknowledged.

Likewise, as this burden has not been discharged by the plaintiff, I consider that the plaintiff have not been able to establish a cause of action against the second defendant under the guarantee and on that finding, the plaintiff's claim must fail.

Lastly, I come to the plaintiff's contention that the written demand as stipulated in cl 1 of the guarantee at AB4 must be read together with cl 8 at AB5, the effect of which is to make such demand unnecessary as the defendant has waived the requirement of demand.

Here again, I see in merits to the plaintiff's contention, as cl 8 is limited to specific waivers of demand covering the following matters:

A (1) Refusal for further credit to the borrowers.
(2) To terminate the facility.
(3) To grant time or indulgence.
(4) To accelerate maturity of obligation, ie to shorten period of availability of credit or renew credit.

B Clause 8 does not apply to the waiver of the demand to pay which has been expressly agreed to in cl 1 and since the guarantee is the plaintiff's own document, they cannot now say that the guarantee is ambiguous as a means of avoiding their primary obligation under the guarantee.

As the plaintiff have failed to establish a cause of action against the second defendant, I accordingly dismiss their claim with costs.

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Claim dismissed.

Reported by Bahma Sivasubramaniam

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